UNITED NATIONS

GENERAL
ASSEMBLY

Distr.
LIMITED

A/CN.9/WG.II/WP.83
18 July 1994

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on
International Contract Practices
Twenty-second session
Vienna, 19 - 30 September 1994

# INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

## Newly revised articles of draft Convention

## Note by the Secretariat

CONTENTS

| | | Page |
|---|---|---|
| INTRODUCTION | | 3 |
| DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT | | 4 |
| CHAPTER I. SCOPE OF APPLICATION | | 4 |
| Article 1. | Scope of application | 4 |
| Article 2. | Undertaking | 4 |
| Article 3. | Independence of undertaking | 5 |
| Article 4. | Internationality of undertaking | 5 |
| CHAPTER II. INTERPRETATION | | 6 |
| Article 5. | Principles of interpretation | 6 |
| Article 6. | Definitions | 6 |

V.94-25126

| | | Page |
|---|---|---|
| CHAPTER III. | EFFECTIVENESS OF UNDERTAKING | 7 |
| Article 7. | [Issuance][Establishment] of undertaking | 7 |
| Article 8. | Amendment | 7 |
| Article 9. | Transfer of beneficiary's right to demand payment | 7 |
| Article 9 bis | Assignment of proceeds | 8 |
| Article 10. | Cessation of effectiveness of undertaking | 9 |
| Article 11. | Expiry | 9 |
| CHAPTER IV. | RIGHTS, OBLIGATIONS AND DEFENCES | 9 |
| Article 12. | Determination of rights and obligations | 9 |
| Article 13. | [Standard of conduct and] liability of guarantor/issuer | 9 |
| Article 14. | Demand | 10 |
| Article 16. | Examination of demand and accompanying documents | 10 |
| Article 17. | Payment or rejection of demand | 10 |
| Article 19. | Improper demand | 11 |
| Article 20. | Set-off | 12 |
| CHAPTER V. | [PROVISIONAL COURT MEASURES] | 12 |
| Article 21. | Provisional court measures | 12 |
| CHAPTER VI. | JURISDICTION | 12 |
| Article 24. | Choice of court or arbitration | 12 |
| Article 24 bis | Jurisdiction of other courts | 13 |
| Article 25. | Determination of court jurisdiction | 13 |
| Article 25 bis | Relationship to other treaty arrangements | 13 |
| CHAPTER VII. | CONFLICT OF LAWS | 14 |
| Article 26. | Choice of applicable law | 14 |
| Article 27. | Determination of applicable law | 14 |

## INTRODUCTION

1. Pursuant to decisions taken by the Commission at its twenty-first and twenty-second sessions, the Working Group on International Contract Practices has devoted its thirteenth to twenty-first sessions to the preparation of a uniform law on independent guarantees and stand-by letters of credit. The reports of those sessions are found in documents A/CN.9/330, 342, 345, 358, 361, 372, 374 , 388 and 391. The working papers discussing possible issues of the uniform law and presenting various draft versions of articles of a draft Convention on independent guarantees and stand-by letters of credit are found in documents A/CN.9/WG.II/WP.65, 67, 68, 70, 71, 73 and Add.1, 75, 76 and Add.1, and 80.

2. The present note contains newly revised articles 1 to 27 of the draft Convention, reflecting the changes agreed upon by the Working Group at the twentieth session with respect to articles 1 and 2(1), and 18 to 27, and at the twenty-first session with respect to articles 2(3) to 17. It may be recalled that at the twenty-first session the Working Group did not complete its review of article 17.

# DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

## CHAPTER I. SCOPE OF APPLICATION

### Article 1. Scope of application

(1) This Convention applies to an international undertaking referred to in article 2 if it is issued in a Contracting State or the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

(2) This Convention applies [also] to a [commercial letter of credit] [letter of credit other than a stand-by letter of credit] if it expressly states that it is subject to this Convention.

(3) The provisions of articles [21] [24] [26] to 27 apply irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article.

### Article 2. Undertaking

(1) (a) For the purposes of this Convention, an undertaking is an independent commitment given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

(b) The undertaking may be designated as a demand guarantee or stand-by letter of credit or an equivalent undertaking, excluding insurance contracts, negotiable instruments and [, subject to paragraph (2) of article 1,] commercial letters of credit.

(2) The undertaking may be given:

(a) at the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) on behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) payment in a specified currency or unit of account;

(b) acceptance of a bill of exchange [(draft)] for a specified amount;

(c) payment on a deferred basis;

(d) supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person, or that one of its branches is the beneficiary, provided that in the latter case the undertaking expressly states that the Convention is to apply.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking, or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event [not] [except presentation of documents or another such act or event] falling within the guarantor/issuer's operational purview.

Article 4. Internationality of undertaking

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) if the undertaking lists more than one place of a given person, the relevant place is that which has the closest relationship to the undertaking;

(b) if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

## CHAPTER II. INTERPRETATION

### Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit.

### Article 6. Definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "undertaking" [includes] [may refer to] "counter-guarantee" and "confirmation of guarantee", and "guarantor/issuer" [includes][may refer to ] "counter-guarantor" and "confirmer";

(b) [deleted]

(c) [deleted]

(d) "counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking [or similar instrument] by its instructing party and providing for payment upon demand and presentation of any specified document indicating that payment under that other undertaking has been demanded from [, or made by,] the person issuing that other undertaking;

(e) "counter-guarantor" means the person issuing a counter-guarantee;

(f) "confirmation" of an undertaking means an independent undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from and, unless expressly stipulated otherwise, presenting any required documents to the confirmer instead of the guarantor/issuer, without, however, losing its right to demand payment from the guarantor/issuer in the event of [non-payment by the confirmer] [rejection by the confirmer of the demand for payment];

(g) "confirmer" means the person confirming an undertaking;

(h) "document" means a communication made in a form that provides a complete record thereof;

(i) "issuance" of an undertaking means that the undertaking leaves the sphere of control of the guarantor/issuer.

(j) [deleted]

## CHAPTER III. EFFECTIVENESS OF UNDERTAKING

### Article 7. [Issuance] [Establishment] of undertaking

(1) An undertaking may be [issued][established] in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(2) An undertaking is effective upon issuance, provided that it does not state a different time of effectiveness, and it is irrevocable unless, when issued, it is stipulated to be revocable.

### Article 8. Amendment

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (1) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an amendment becomes effective when it is issued by the guarantor/issuer, if previously authorized by the beneficiary or consisting solely of an extension of the validity period of the undertaking; any other amendment becomes effective when the guarantor/issuer receives a notice of acceptance by the beneficiary.

(3) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

### Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment under the undertaking may be transferred only if so, and to the extent and in the manner, authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

Article 9 bis. Assignment of proceeds

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer, or another person obliged to effect payment, has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

Article 10. Cessation of effectiveness of undertaking

(1) The undertaking ceases to be effective when:

(a) the guarantor/issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the guarantor/issuer agree on the termination of the undertaking in a form referred to in paragraph (1) of article 7;

(c) the amount available under the undertaking is paid, unless the undertaking provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or

(d) the validity period of the undertaking expires in accordance with the provisions of article 11.

(1 bis) Cessation of the effectiveness of the undertaking terminates the right of the beneficiary to demand payment under the undertaking, but does not affect other rights or obligations of the beneficiary or other parties created under the undertaking prior to the cessation of its effectiveness.

(2) Notwithstanding paragraph (1) of this article, the undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article, would be required for the cessation of effectiveness of the undertaking; retention of any such document by the beneficiary after the undertaking ceases to be effective [, or after full payment has been made,] does not preserve any rights of the beneficiary under the undertaking.

### Article 11. Expiry

The validity period of the undertaking expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of the guarantor/issuer, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) if expiry depends according to the undertaking on the occurrence of an event, when the guarantor/issuer receives confirmation that the event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event;

(c) if the undertaking does not state an expiry date, or if a stated expiry event has not yet been established by presentation of the required document, when six years have elapsed from the date of issuance of the undertaking.

## CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

### Article 12. Determination of rights and obligations

(1) Subject to the provisions of this Convention, the rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of [independent] guarantee or stand-by letter of credit practice.

### Article 13. [Standard of conduct and] liability of guarantor/issuer

(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

Article 14. Demand

Any demand for payment under the undertaking shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the undertaking. In particular, any certification or other document required by the undertaking shall be presented, within the time of effectiveness of the undertaking, to the guarantor or issuer at the place where the undertaking was issued, unless another person or another place has been stipulated in the undertaking. If no certification or other document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that the demand is not in bad faith or otherwise improper.

Article 16. Examination of demand and accompanying documents

(1) The guarantor/issuer shall examine the demand and any other, accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 13. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven [banking][business] days, in which to examine the demand and any other, accompanying documents and to decide whether or not to pay.

Article 17. Payment or rejection of demand

(1) Subject to paragraph (2) of this article, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(1 bis) Any payment against a demand that is not in accordance with the provisions of article 14 does not prejudice the rights of the principal/applicant.

(2) Where the guarantor/issuer is shown facts that make the demand manifestly and clearly improper according to article 19, it [shall not make payment] [may nevertheless decide to make payment, provided it acts in conformity with paragraph (1) of article 13].

[Note to the Working Group: The remainder of article 17, which was not considered at the twenty-first session, is reproduced as it appeared in A/CN.9/WG.II/WP.80.]

(3) If the guarantor or issuer rejects the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, the notice shall indicate the reason for the rejection.

[(4) Variant A If the guarantor or issuer fails to comply with the provisions of article 16(2) or of paragraph (3) of this article, it is precluded from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.

Variant B The guarantor or issuer may not invoke any discrepancy in the documents not discovered within the time referred to in article 16(2) or not notified to the beneficiary as required by paragraph (3) of this article; if the guarantor or issuer in any other respect fails to comply with those provisions, the beneficiary may recover from the guarantor or issuer damages for loss suffered as a consequence of that failure.

Variant C Where the guarantor or issuer has failed to discover or notify a certain discrepancy in the documents as required by article 16(2) and paragraph (3) of this article and if compliance with those provisions would have enabled the beneficiary to make a conforming demand before the expiry of the guaranty letter, the guarantor or issuer shall pay the amount of the guaranty letter, plus interest for delay, upon a conforming demand made at the latest [five days] [promptly] after having been notified of that discrepancy.

Variant D If the guarantor or issuer fails to comply with paragraphs (1) and(1 bis) of this article or to discover or to notify any discrepancy in the documents as required by article 16(2) and paragraph (3) of this article, it is liable to the beneficiary for loss suffered as a direct result of such failure.]

## Article 19. Improper demand

(1) A demand for payment is improper if.

(a) any document is forged;

(b) no payment is due on the basis asserted in the demand and the supporting documents; or

(c) judging by the type and purpose of the undertaking, the demand has no conceivable basis.

(2) The following are types of situations in which a demand has no conceivable basis:

(a) the contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) the underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) the secured obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) fulfillment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary.

Article 20. Set-off

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer [or another person authorized to effect payment] may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant.

[CHAPTER V. PROVISIONAL COURT MEASURES]

Article 21. Provisional court measures

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that a demand made, or expected to be made, by the beneficiary is improper, the court may issue a provisional order to the effect that the beneficiary does not receive payment [or that funds of the guarantor/issuer or of the beneficiary are blocked], taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) [deleted]

(3) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(4) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than improper demand or use of the undertaking for an illegal purpose.

CHAPTER VI. JURISDICTION

Article 24. Choice of court or arbitration

The guarantor/issuer and the beneficiary [, one or more of whom have a place of business in a Contracting State,] may stipulate in the undertaking or agree elsewhere in a form referred to in paragraph (1) of article 7 that a court or the courts of a Contracting State have jurisdiction to settle any disputes that have arisen or which may arise in relation to the undertaking or that any such dispute shall be settled by arbitration. The chosen court or courts have exclusive jurisdiction unless otherwise stipulated or agreed.

Article 24 bis. Jurisdiction of other courts

Every court other than the chosen court or courts shall decline jurisdiction, except

(a) where the choice of court made by the guarantor/issuer and the beneficiary is not exclusive;

(b) where the choice of court is not made in accordance with article 24;

(c) for the purpose of provisional court measures;

(d) where a decision of the court designated in accordance with article 24 [is not capable of recognition and enforcement] [does not fulfil the conditions of recognition and enforcement in another Contracting State]; or

[(e) where the chosen court has declined to exercise jurisdiction].

Article 25. Determination of court jurisdiction

(1) Unless otherwise stipulated in the undertaking or agreed elsewhere by the guarantor/issuer and the beneficiary in a form referred to in paragraph (1) of article 7, [and without prejudice to existing rules on jurisdiction in Contracting States or to arbitration under article 24,] the courts of the Contracting State where the undertaking was issued have jurisdiction over disputes between the guarantor/issuer and the beneficiary relating to the undertaking.

(2) The courts of the Contracting State where the undertaking was issued [may entertain] [have jurisdiction over] applications by the principal/applicant or the instructing party in accordance with article 21 for provisional orders against the guarantor/issuer or the beneficiary.

Article 25 bis. Relationship to other treaty arrangements

If the guarantor/issuer and the beneficiary have their place of business in States that are bound by a treaty establishing rules of jurisdiction or providing for recognition and enforcement in a State of decisions given in another State, the provisions of that treaty shall supersede the corresponding provisions of articles 24, 24 bis and 25.

## CHAPTER VII. CONFLICT OF LAWS

### Article 26. Choice of applicable law

The rights, obligations and defences relating to an undertaking are governed by the law designated by the guarantor/issuer and the beneficiary. Such designation may be stipulated in the undertaking or agreed elsewhere, or it may be demonstrated by the terms and conditions of the undertaking.

### Article 27. Determination of applicable law

Failing a choice of law in accordance with article 26, the rights, obligations and defences relating to an undertaking are governed by the law of the State where the undertaking was issued.

* * *